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No. 99-1815

IN THE

Supreme Court of the United States

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

KENTUCKY RIVER COMMUNITY CARE, INC., *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF OF AMERICAN NURSES ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* OF AMERICAN NURSES ASSOCIATION IN SUPPORT OF PETITIONER

The American Nurses Association ("ANA") respectfully moves this Court for leave to file the accompanying brief *amicus curiae* in support of Petitioner National Labor Relations Board. The Solicitor General on behalf of the Board, and counsel for Respondent Kentucky State District Council of Carpenters, AFL-CIO, consent to the filing of this brief.[1] The consent of the attorney for Respondent Kentucky River Community Care, Inc. was requested but refused.

[1] These letters of consent have been filed with the Clerk of this Court.

INTEREST OF THE *AMICUS CURIAE*

ANA is a national labor organization through the United American Nurses (ANA's collective bargaining structure) and a federation of 54 state and territorial constituent associations with over 200,000 registered nurse members. The question ANA's brief addresses is whether the National Labor Relations Board reasonably determined that when a professional employee, such as a registered nurse, exercises ordinary professional judgment in accordance with employer-specified standards and the employee's special professional competence and licensure, the professional does not thereby exercise the sort of "independent judgment" that would make the professional a "supervisor" under Section 2(11) of the National Labor Relations Act ("Act"), 29 U.S.C. § 152(11).[2]

The Court's answer to this question will directly affect the registered nurse members of ANA who exercise their professional judgment in the course of delivering skilled nursing services to patients. If the court of appeals' decision stands, almost all of the registered nurses represented by ANA's constituent organizations will be at risk of losing the protection of the Act.

ANA filed an *amicus curiae* brief with this Court in *NLRB v. Health Care & Retirement Corp. of America*, 511 U.S. 571 (1994), that addressed the § 2(11) questions there presented with respect to registered nurses. The brief ANA requests permission to file here would, we submit, be of equal assistance to the Court in deciding the related, but distinct, Section 2(11) issue before the Court in this case, that likewise involves the profession of registered nursing.

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[2] We limit ourselves to this question (the first presented by the Board's Petition), and leave it to the Board, whose position we fully support, to address the remaining two questions presented.

Consistent with ANA's identity as an organization composed solely of registered nurses and devoted exclusively to their profession, ANA's brief concentrates on the profession of registered nursing. The brief places particular emphasis on the source materials (such as state nurse practice acts, hospital organization and protocols, and scholarly literature) that confirm that the registered nurse's exercise of independent judgment is (1) a function of the registered nurse's professional knowledge, license and state regulation, and not of front-line management prerogatives bestowed by any given employer, and (2) circumscribed by standards imposed by law, regulation and the hospital itself.

Respectfully submitted,

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
SUMMARY OF ARGUMENT	2
ARGUMENT	2
I. WHEN AN RN'S EXERCISE OF INDEPENDENT JUDGMENT IN DIRECTING WORK IS A FUNCTION OF HER EXPERTISE, RATHER THAN FRONT-LINE MANAGEMENT PREROGATIVES, IT IS NOT § 2(11) SUPERVISION	2
A. State Nurse Practice Acts	2
B. The Profession	7
II. REGISTERED NURSES' EXERCISE OF "INDEPENDENT JUDGMENT" IS CIRCUMSCRIBED BY STATE, FEDERAL AND HOSPITAL LAW AND REGULATION	9
A. State Law	10
B. Federal Regulations And Hospital Protocols	11
CONCLUSION	14

TABLE OF AUTHORITIES

CASES — Page

Beverly Enters. v. NLRB, 148 F.3d 1042 (8th Cir. 1998) 13
Beverly Enterprises–Pennsylvania, Inc. v. NLRB, 129 F.3d 1269 (D.C. Cir. 1997) 9
NLRB v. GranCare, Inc., 170 F.3d 662 (7th Cir. 1999) 7
NLRB v. Health Care & Retirement Corp. of Am., 511 U.S. 571 (1994) 2
NLRB v. Yeshiva Univ., 444 U.S. 672 (1980) 2

STATUTES, RULES AND REGULATIONS

National Labor Relations Act, 29 U.S.C. § 152(11) ..... *passim*
42 C.F.R. § 482.23(a) 12
42 C.F.R. § 488.5 12
Ala. Code § 34-21-1(3) 3
Alaska Stat. § 08.68.100(a)(9) 3
Ariz. Rev. Stat. § 32-1601(10)-(11) 3
Colo. Rev. Stat. § 12-38-103(9)-(10) 3
Colo. Rev. Stat. § 12-38-132 4
Del. Code Ann. tit. 24, § 1902(b) 3
Del. Code Ann. tit. 24, § 1902(b)(7) 4
Fla. Admin. Code Ann. r. 59A-3.2085(5)(d) 10
Fla. Admin. Code Ann. r. 59A-3.2085(5)(f) 5
Fla. Stat. Ann. § 400.23 5
Haw. Rev. Stat. Ann. § 457-2 4
Ind. Code Ann. § 25-23-1-1.1(b)(7) 4
Kan. Admin. Regs. 28-34-7 5
Kan. Admin. Regs. 28-34-55 10
Ky. Rev. Stat. Ann. § 314.011(2) 6
Ky. Rev. Stat. Ann. § 314.011(6)(d) 3
La. Rev. Stat. Ann. § 37:913(14)(f) 6
Me. Rev. Stat. Ann. tit. 32, § 2102(2)(C)-(D) 4, 6

TABLE OF AUTHORITIES—Continued

Page

Md. Code Ann., Health Occ. § 8-101(a)(iv) 4
Mass. Ann. Laws ch. 112, § 80B 6
Mich. Comp. Laws § 333.16104(1) 6
Mich. Comp. Laws § 333.17201(c) 3
Minn. R. 4640.0900 ..... 5, 10
Minn. Stat. § 148.171(14) 3
Minn. Stat. § 148.171(15) 3, 4
Miss. Code Ann. § 73-15-5(2)-(3) 3, 4
Mont. Code Ann. § 37-8-102(5)(a) 3
Mont. Code Ann. § 37-8-102(5)(b) 3, 4
Neb. Rev. Stat. § 71-1, 132.05(8) 3, 4
Neb. Rev. Stat. § 71-1, 132.05(9) 3
N.H. Rev. Stat. Ann. § 326-B:2(XVI), (XVII), (XVIII) 3
N.H. Rev. Stat. Ann. § 326-B:2(XVIII)(d) 4
N.J. Stat. Ann. § 45:11-23(1)(b) 3
N.M. Stat. Ann. § 61-3-3(J)(8) 4
N.Y. Comp. Codes R. & Regs. tit. 10, § 405.5 5
N.C. Gen. Stat. § 90-171.20(7)(d) 4
N.C. Gen. Stat. § 90-181.20(8)(c) 6
N.D. Cent. Code § 43-12.1-02(6)(d) 4
Ohio Rev. Code Ann. § 4723.02(B)(6) 3
Okla. Stat. tit. 59, § 567.3a 6
Okla. Stat. tit. 59, § 567.3a(3)(g) 4
28 Pa. Code § 109.4 5
28 Pa. Code § 109.6 11
28 Pa. Code § 109.21 10
28 Pa. Code § 109.23(b) 11
S.C. Code Ann. § 40-33-10(g)-(h) 3
S.D. Codified Laws Ann. § 36-9-3(2) 4
22 Tex. Admin. Code § 218 6
Utah Admin. Code R432-100-12 10
Utah Code Ann. § 58-31b-102(10)(g) 4

TABLE OF AUTHORITIES—Continued

	Page
Vt. Stat. Ann. tit. 26, § 1572(2)(G)	4
Wash. Rev. Code § 18.79.040(1)(c)	4
Wash. Rev. Code § 18.135.026(6)	6
Wis. Stat. § 441.11(4)	4
Wyo. Stat. Ann. § 33-21-120(a)(ix)	4
Second Notice of Proposed Rulemaking, 53 Fed. Reg. 33,900 (1988)	3
Mem. Mich. Att'y Gen., *Delegation and Supervision Under the Public Health Code* (Oct. 27, 1982)	7
1981 Op. Att'y Gen. Fla. 171, 1981 Fla. AG LEXIS 44 (1981)	6
Op. Kan. Att'y Gen. No. 91-45 (1991), 1991 Kan. AG LEXIS 45 (1991)	6
Alaska Board of Nursing, Position Statement Regarding Delegation by Nurses of Nursing Tasks to Unlicensed Assistive Staff of Assisted Living Homes (June 2, 1995)	4
Colorado State Board of Nursing, Rules and Regulations Regarding the Delegation of Nursing Functions, Chapter XIII (1992)	
Rule 2	4
Rule 3.3	6
Georgia Board of Nursing, Policy Statement: Assignment to Unlicensed Assistive Personnel (2000)	4
Georgia Board of Nursing: Standards of Registered Professional Nursing Practice, Amended, Chapter 410-11, 410-11-.01(2) (2000)	4
Maryland Board of Nursing, Declaratory Ruling 92-1 (1992)	4

TABLE OF AUTHORITIES—Continued

	Page
Oregon Board of Nursing, Standards for Registered Nurse Delegation of Nursing Care Tasks to Unlicensed Persons in Settings Where Registered Nurses Are Not Regularly Scheduled, Rule 851-47-010	6
Joint Commission on Accreditation of Healthcare Organizations 2000 Automated Accreditation Manual for Hospitals Updates (2000)	
Intent of LD.2.1 Through LD.2.10	13
Intent of NR.2 Through NR.4	12
Standards on Care of Patients: Overview	13
Standard LD.2.3	13
Standard LD.2.4	13
Standard LD.2.5	13
Standard NR.2	12
Standard NR.3	12
Standard and Intent of PE.4.3	12
MISCELLANEOUS	
Carol M. Boston, MSN, RN, *Nurse Assistive Programs*, 20 JONA 5 (1990)	8
Joan L. Creasia & Barbara Parker, *Conceptual Foundations of Professional Nursing Practice* (1991)	9
Illustrated Manual of Nursing Practice (1991)	9
Fred D. Jung, PhD, RN, *Teaching Registered Nurses How to Supervise Nursing Assistants*, 21 JONA 32 (1991)	8
Lucie Young Kelly, R.N., Ph.D., F.A.A.N. & Lucille A. Joel, R.N., Ed.D., F.A.A.N., *Dimensions of Professional Nursing* (1995)	9

TABLE OF AUTHORITIES—Continued

	Page
Susan M. Kennerly, RN, PhD, CCRN, *Implications of the Use of Unlicensed Personnel: A Nursing Perspective*, 16(5) Focus on Critical Care 364 (1989)	5
Barbara Kozier, et al., *Introduction to Nursing* (1989)	9
Susan Kun Leddy, R.N., Ph.D., *Conceptual Bases of Professional Nursing* (1998)	7, 8
Barbara W. Narrow & Kay Brown Buschle, *Fundamentals of Nursing Practice* (1987)	9
Patricia A. Potter, RN, MSN & Anne Griffin Perry, RN, MSN, EdD, *Basic Nursing: A Critical Thinking Approach* (1999)	9
Richard Strichartz, *Commentary on the Michigan Public Health Code* (Health Code Implementation Project) (1982)	6
Sister Patricia A. Sullivan, RSM, ScD, RN & Reverend Timothy Brown, SJ, JD, *Unlicensed Persons in Patient Care Settings: Administrative, Policy, and Ethical Issues*, 24 Nursing Clinics of North America 557 (1989)	7, 8

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BRIEF OF AMERICAN NURSES ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

This *amicus curiae* brief is filed contingent upon the grant of the foregoing motion for leave to file the brief. The interest of the American Nurses Association ("ANA") is set forth in that motion.[1]

[1] In accordance with Rule 37.6 of the Rules of this Court, ANA states that its counsel authored this brief in whole, and that no person or entity, other than ANA, its members, or its counsel, made a monetary contribution to the preparation or submission of the brief.

SUMMARY OF ARGUMENT

To the extent an exercise by a registered nurse ("RN") of independent judgment in overseeing the work of less-skilled employees arises from the nurse's professional authority, the exercise of such authority does not constitute § 2(11) "independent judgment" in "the exercise of" one of the enumerated Section 2(11) powers. Moreover, insofar as the exercise of an RN's authority is confined by federal guidelines, state regulations and hospital policies, protocols and management directives, such exercise must be considered "routine or clerical," within the meaning of § 2(11).

ARGUMENT

I. WHEN AN RN'S EXERCISE OF INDEPENDENT JUDGMENT IN DIRECTING WORK IS A FUNCTION OF HER EXPERTISE, RATHER THAN FRONT-LINE MANAGEMENT PREROGATIVES, IT IS NOT § 2(11) SUPERVISION

It is within "the scope of the duties routinely performed by similarly situated professionals" (*NLRB v. Yeshiva Univ.*, 444 U.S. 672, 690 (1980)) for registered nurses in providing patient care to exercise their "professional knowledge" (*NLRB v. Health Care & Retirement Corp. of Am.*, 511 U.S. 571, 583 (1994)) by directing the activities of less-skilled health care workers. In what follows, we demonstrate that a nurse's authority in this regard derives from state nurse practice acts, regulations of state boards of nursing, her professional license and her nursing training, and not from "front-line management prerogatives" (*Health Care*, 511 U.S. at 583) conferred by her employer.

A. State Nurse Practice Acts

Nursing practice is regulated and controlled by the states through their state nurse practice acts, which nurses "are

required to follow." Second Notice of Proposed Rulemaking, 53 Fed. Reg. 33,900, 33,912 (1988).[2] These acts recognize the professional registered nurse's role in a state's health care delivery system and generally establish statutory nursing practice definitions consistent with current and prospective nursing practice. Nurse practice acts also generally differentiate the duties of registered professional nurses from those of less-skilled health care workers such as licensed practical nurses, nursing aides or assistants.[3] It is these statutes (and not employers) that confer on a registered nurse the authority to carry out her professional responsibilities in a health care facility.

Numerous states' definitions of the nurse as a professional similarly provide that the nurse's scope of practice "includes the teaching, direction, and supervision of less skilled personnel in the performance of delegated nursing activities." Mich. Comp. Laws § 333.17201(c); *see also* Ky. Rev. Stat. Ann. § 314.011(6)(d) ("'Registered nursing practice'" is "the performance of acts requiring substantial specialized knowledge, judgment, and nursing skill," including "[t]he supervision, teaching of, and delegation to other personnel in the performance of activities relating to nursing care."); Ohio Rev. Code Ann. § 4723.02(B)(6) ("'Practice of nursing as a registered nurse'" encompasses the provision of nursing care requiring "specialized knowledge, judgment, and skill," and

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[2] Authority to issue licenses, rules, regulations and advisory opinions under these acts typically rests with the state boards of nursing. *See, e.g.*, Alaska Stat. § 08.68.100(a)(9).

[3] *See* Ala. Code § 34-21-1(3); Ariz. Rev. Stat. § 32-1601(10)-(11); Colo. Rev. Stat. § 12-38-103(9)-(10); Del. Code Ann. tit. 24, § 1902(b); Minn. Stat. § 148.171(14)-(15); Miss. Code Ann. § 73-15-5(2)-(3); Mont. Code Ann. § 37-8-102(5)(a)-(b); Neb. Rev. Stat. § 71-1, 132.05(8)-(9); N.H. Rev. Stat. Ann. § 326-B:2(XVI), (XVII), (XVIII); N.J. Stat. Ann. § 45:11-23(1)(b); S.C. Code Ann. § 40-33-10(g)-(h).

specifically, "[t]eaching, administering, supervising, delegating, and evaluating nursing practice.").[4]

Many state boards of nursing have issued regulations and opinions that are to the same effect. *See, e.g.*, Alaska Board of Nursing, Position Statement Regarding Delegation by Nurses of Nursing Tasks to Unlicensed Assistive Staff of Assisted Living Homes (June 2, 1995) ("Delegation of some nursing activities is a legally accepted part of nursing practice."); Maryland Board of Nursing, Declaratory Ruling 92-1 (1992) ("The Board of Nursing considers it within the scope of practice of a licensed nurse to delegate selected nursing tasks to unlicensed personnel . . . ."); Colorado State Board of Nursing, Rules and Regulations Regarding the Delegation of Nursing Functions, Chapter XIII, Rule 2 (1992) ("Supervision of personnel associated with nursing functions is included in the legal definition of the practice of professional nursing."); Georgia Board of Nursing, Policy Statement: Assignment to Unlicensed Assistive Personnel (2000) ("Registered nurses have always utilized unlicensed individuals to assist in the provision of nursing care."); Georgia Board of Nursing: Standards of Registered Professional Nursing Practice, Amended, Chapter 410-11, 410-11-.01(2) (2000) ("[A]ssessment, nursing diagnosis, planning, intervention, evaluation, teaching, and supervision

[4] *See also* Colo. Rev. Stat. § 12-38-132; Del. Code Ann. tit. 24, § 1902(b)(7); Haw. Rev. Stat. Ann. § 457-2; Ind. Code Ann. § 25-23-1-1.1(b)(7); Me. Rev. Stat. Ann. tit. 32, § 2102(2)(C)-(D); Md. Code Ann., Health Occ. § 8-101(a)(iv); Minn. Stat. § 148.171(15); Miss. Code Ann. § 73-15-5(2)-(3); Mont. Code Ann. § 37-8-102(5)(b); Neb. Rev. Stat. § 71-1, 132.05(8); N.H. Rev. Stat. Ann. § 326-B:2(XVIII)(d); N.M. Stat. Ann. § 61-3-3(J)(8); N.C. Gen. Stat. § 90-171.20(7)(d); N.D. Cent. Code § 43-12.1-02(6)(d); Okla. Stat. tit. 59, § 567.3a(3)(g); S.D. Codified Laws Ann. § 36-9-3(2); Utah Code Ann. § 58-31b-102(10)(g); Vt. Stat. Ann. tit. 26, § 1572(2)(G); Wash. Rev. Code § 18.79.040(1)(c); Wis. Stat. § 441.11(4); Wyo. Stat. Ann. § 33-21-120(a)(ix).

are the major responsibilities of the registered nurse in the practice of nursing.").[5]

Implicit in these regulatory definitions of nursing practice is the recognition that a registered professional nurse, in order to perform the duties and responsibilities that most state laws impose, must exercise ordinary professional judgment in directing the work of other registered professional nurses and less-skilled, nonprofessional health care employees. To this end, many states mandate that medical facilities provide

> [a] sufficient number of registered professional nurses . . . on duty at all times to plan, assign, supervise, and evaluate nursing care as well as to give patients such nursing care as requires the judgment and specialized skills of a registered nurse. A graduate nurse, or graduate practical nurse, providing care shall be under the supervision of a registered nurse.

28 Pa. Code § 109.4.[6]

The distinction between the authority bestowed on nurses by licensure and nurse practice acts to carry out their professional role, and the authority over personnel supervision conferred by an employer that falls within Section 2(11) of the Act, is further confirmed by many state statutes and accompanying regulations and interpretations. Thus, several states allow professional nurses to delegate only

[5] *See also* Susan M. Kennerly, RN, PhD, CCRN, *Implications of the Use of Unlicensed Personnel: A Nursing Perspective*, 16(5) Focus on Critical Care 364, 367 (1989) ("Because . . . unlicensed individuals . . . function in a contributory nursing role that requires their reporting directly to nurses in the practice setting," the realities of a registered nurse's duties under the scope of professional nursing practice encompass the oversight and supervision of nursing assistants and aides.).

[6] *See also* Fla. Admin. Code Ann. r. 59A-3.2085(5)(f); Fla. Stat. Ann. § 400.23; Kan. Admin. Regs. 28-34-7; Minn. R. 4640.0900; N.Y. Comp. Codes R. & Regs. tit. 10, § 405.5.

"selected acts, tasks, or functions,"[7] "auxiliary services"[8] or "ministerial acts."[9] As one commentator has observed: "The concept of delegation enables others to perform *routine* activities so as to free the delegating health professional for more complex tasks."[10]

Accordingly, far from being "supervision" emblematic of a "front-line management prerogative," exercise of independent judgment in supervising registered professional nurses' aides is mandated by the state nurse practice acts as an adjunct to

[7] Mich. Comp. Laws § 333.16104(1). "'Delegation' means an authorization granted by a licensee to a licensed or unlicensed individual to perform selected acts, tasks, or functions *that fall within the scope of practice of the delegator* and that are not within the scope of practice of the delegatee and that, in the absence of the authorization, *would constitute illegal practice of a licensed profession.*" *Id.* (emphasis added); *see also* Colorado State Board of Nursing, Rules and Regulations Regarding the Delegation of Nursing Functions, Chapter XIII, Rule 3.3 (1992) ("'Delegation' means the assignment to a competent individual the authority to perform in a selected situation a selected nursing task included in the practice of professional nursing . . . ."); Ky. Rev. Stat. Ann. § 314.011(2); La. Rev. Stat. Ann. § 37:913(14)(f); Me. Rev. Stat. Ann. tit. 32, § 2102(2)(C)-(D); Mass. Ann. Laws ch. 112, § 80B; N.C. Gen. Stat. § 90-181.20(8)(c); Okla. Stat. tit. 59, § 567.3a; Oregon Board of Nursing, Standards for Registered Nurse Delegation of Nursing Care Tasks to Unlicensed Persons in Settings Where Registered Nurses Are Not Regularly Scheduled, Rule 851-47-010; 22 Tex. Admin. Code § 218; Wash. Rev. Code § 18.135.026(6).

[8] Op. Kan. Att'y Gen. No. 91-45 (1991), 1991 Kan. AG LEXIS 45 (1991) (Auxiliary patient care services refer to acts which support or assist nursing services.).

[9] 1981 Op. Att'y Gen. Fla. 171, 1981 Fla. AG LEXIS 44 (1981) (registered nurses may delegate ministerial functions to nursing assistants so as to utilize the RNs' professional training).

[10] *See* Richard Strichartz, *Commentary on the Michigan Public Health Code* (Health Code Implementation Project) (1982) (emphasis added).

the delegation of supportive tasks.[11] In sum, when a nurse's authority derives from a source (such as her license or state regulation) other than her employer, the exercise of *that* authority is not § 2(11) supervision, as it does not derive from a *management* prerogative reserved to an employer.[12] *See NLRB v. GranCare, Inc.*, 170 F.3d 662, 668 (7th Cir. 1999) (The " 'judgment' " of licensed practical nurses "in exercising their incidental supervisory authority over" certified nursing assistants "is not the 'independent judgment' concerned with management prerogatives contemplated by § 2(11). Rather, it is more properly viewed as 'professional judgment' exercised in getting their assigned work done with the assistance of CNAs employed for that purpose.").

B. The Profession

As nursing scholarly literature, education and training make plain, the above distinction likewise lies at the core of nursing as a profession. Thus, while "[i]n most jobs, people who are responsible for the work of others have some say in their hiring, firing, and career/or job development," nurses "are expected to be responsible for the action of assistants over whom they have little, if any, control." Sister Patricia A.

[11] Mem. Mich. Att'y Gen., *Delegation and Supervision Under the Public Health Code* at 3 (Oct. 27, 1982) (Clear distinction exists between "the supervision which may occur in an employment/management situation" and "the supervision which is required to effectuate a legal delegation under the Code.").

[12] For example, an employer could not lawfully order a nurse to direct the work of a less-skilled employee in a manner inconsistent with a state nurse practice act, nor give a non-RN authority reserved to RNs by law. *See* Susan Kun Leddy, R.N., Ph.D., *Conceptual Bases of Professional Nursing* 445-46 (1998) ("The employer may suggest, but cannot decide, which nursing acts can safely be delegated and to whom." Hospital policies "'cannot override the law and rules of nursing and will not protect the nurse who is following policy but acting outside of the practice act.'" (citation omitted)).

Sullivan, RSM, ScD, RN & Reverend Timothy Brown, SJ, JD, *Unlicensed Persons in Patient Care Settings: Administrative, Policy, and Ethical Issues*, 24 Nursing Clinics of North America 557, 564 (1989). And, in directing nursing aides, "the RNs' focus [is] on the professional activities requiring their knowledge and skills." Fred D. Jung, PhD, RN, *Teaching Registered Nurses How to Supervise Nursing Assistants*, 21 JONA 32, 32 (1991).

Moreover, as authority that properly falls within the scope of professional nursing, "appropriate delegation" of those tasks "to unlicensed nursing personnel" is not a prerogative of management, but rather a means "to balance nursing supply and demand," thereby "facilitating *the RN's* availability for bedside nursing care. The ultimate goal, of course, is to *support the RN* and enhance nursing resources by effectively using assistive nursing personnel." Carol M. Boston, MSN, RN, *Nurse Assistive Programs*, 20 JONA 5, 6 (1990) (emphasis added). In many settings, nursing assistants are employed "to assure an environment in which nurses can most efficiently and effectively provide nursing care . . . [and are] *accountable to the head nurse* or a designate." Sullivan & Brown, 24 Nursing Clinics of North America at 559 (emphasis added); *see also* Leddy, *supra* note 12, at 445 ("A staff nurse delegates to get work accomplished in a timely manner." Given the increasing hospital use of aides, "delegation between nursing staff and assistants on the unit 'is the most significant aspect of delegation for the professional staff nurse.'" (citation omitted)).

Nursing students are taught this distinction as part of their training in working with and overseeing the work of less-skilled workers. As several basic nursing textbooks explain: "health care services in the hospital and other clinical settings will include much greater involvement of . . . ancillary personnel, such as health care assistants and nursing aides. While you'll still be accountable for the care of the patients

and their families, you'll also need to delegate many more activities." *Illustrated Manual of Nursing Practice* 7 (1991); *see also* Joan L. Creasia & Barbara Parker, *Conceptual Foundations of Professional Nursing Practice* 80 (1991); Lucie Young Kelly, R.N., Ph.D., F.A.A.N. & Lucille A. Joel, R.N., Ed.D., F.A.A.N., *Dimensions of Professional Nursing* 178 (1995).

Similarly, another basic nursing text describes the nurse's role in working with other health care personnel as an

> *interdependent professional relationship*[] [in which] the nurse delegates responsibilities and tasks to other people such as licensed practical nurses, orderlies, or nurse's aides. As a member of the health care team, the nurse is often expected to plan, lead, administer, delegate, organize, and coordinate. *Such activities are an essential part of nursing, but they are activities shared by many other professional people and are, therefore, not unique to nursing.*

Barbara W. Narrow & Kay Brown Buschle, *Fundamentals of Nursing Practice* 34 (1987) (emphasis added); *see also* Patricia A. Potter, RN, MSN & Anne Griffin Perry, RN, MSN, EdD, *Basic Nursing: A Critical Thinking Approach* 39 (1999); Barbara Kozier, et al., *Introduction to Nursing* 12 (1989).

II. REGISTERED NURSES' EXERCISE OF "INDEPENDENT JUDGMENT" IS CIRCUMSCRIBED BY STATE, FEDERAL AND HOSPITAL LAW AND REGULATION

Even those types of authority that fall within § 2(11) are supervisory *only* where their exercise involves independent judgment, and are not "routine or clerical" in nature. As the court held in *Beverly Enterprises–Pennsylvania, Inc. v. NLRB*, 129 F.3d 1269, 1270 (D.C. Cir. 1997):

> [T]he question of independent judgment under section 2(11) is one of the degree of discretion exercised with respect to the statutory indicia of supervisory status. If an individual's discretion with respect to assignment, discipline, or the other statutory factors is tightly constrained, then her exercise of that authority is "routine" and does not involve "independent judgment."

We show below that, although registered nurses may direct work, the judgment necessary to do so is often limited by mandates of state law, federal regulation and hospital protocols to the point where it becomes "routine or clerical" for § 2(11) purposes.

A. State Law

The registered nurse's judgment in directing the work of other members of the nursing staff is often severely limited by state statutes regulating health care facilities. These statutes in many cases require that the hospital or facility formulate specific policies and procedures related to nursing care and practice. For example, under the Florida Administrative Code, "[e]ach hospital shall develop written standards of nursing practice and related policies and procedures to define and describe the scope and conduct of patient care provided by the nursing staff." Fla. Admin. Code Ann. r. 59A-3.2085(5)(d). Similarly, under the Pennsylvania Administrative Code, "[w]ritten nursing care and administrative policies and procedures shall be developed to provide the nursing staff with methods of meeting its responsibilities and achieving goals." 28 Pa. Code § 109.21; *see also* Kan. Admin. Regs. 28-34-55; Minn. R. 4640.0900; Utah Admin. Code R432-100-12.

The policies and procedures required by state law are, in many cases, quite specific. For example, in Pennsylvania, the law requires hospitals to promulgate written procedures on matters ranging from standards of nursing practice to

scheduling of nursing staff. Thus, 28 Pa. Code § 109.23(b) provides that:

> Nursing care policies and procedures shall be consistent with professionally recognized standards of nursing practice . . . . These policies shall include procedures for the following:
>
> (1) Noting diagnostic and therapeutic orders.
>
> (2) Assigning the nursing care of patients.

Similarly, 28 Pa. Code § 109.6 states that:

> Staffing patterns should reflect consideration of nursing goals, standards of nursing practice, and the needs of the patients.
>
> (b) Staffing schedules shall accomplish the following:
>
> (1) Staffing patterns which reflect the quality and quantity of various categories of nursing personnel necessary to carry out the nursing care program.
>
> . . . .
>
> (3) The patient care assignment is commensurate with the qualifications of each nursing staff member, the identified nursing needs of the patient, and the prescribed medical regimen.

B. Federal Regulations And Hospital Protocols

The standards most hospitals must meet as a condition for participation in the federal Medicare program likewise sharply constrain the discretion of individual nurses to "direct" the work of others. In order to be eligible for Medicare payment, hospitals must satisfy the Conditions of Participation in the Medicare program promulgated by the federal Health Care Financing Administration ("HCFA"). As a condition of participation under HCFA,

> [t]he hospital must have a well-organized [nursing] service with a plan of administrative authority and

> delineation of responsibilities for patient care. The director of the nursing service must be a licensed registered nurse. He or she is responsible for the operation of the service, including determining the types and numbers of nursing personnel and staff necessary to provide nursing care for all areas of the hospital.

42 C.F.R. § 482.23(a).

Most hospitals qualify for participation in the Medicare program through voluntary accreditation by the Joint Commission on Accreditation of Healthcare Organizations ("JCAHO"), a private body. Hospitals that are accredited by JCAHO are "deemed" by the federal government to have met HCFA's Medicare Conditions of Participation. *See, e.g.*, 42 C.F.R. § 488.5.

JCAHO Accreditation Standards mandate that hospital policies allow registered nurses to "determine and set priorities on a patient's nursing care needs." JCAHO 2000 Automated Accreditation Manual for Hospitals Updates (2000), Standard and Intent of PE.4.3. The activities of less-skilled assistants, "such as licensed practical nurses, licensed vocational nurses, mental health technicians, or nursing assistants . . . [must] comply with applicable laws and regulations and with hospital policies and procedures." *Id.* The JCAHO Standards further provide that "nursing policies, procedures, and standards describe and guide how the nursing staff provides the nursing care required." *Id.*, Intent of NR.2 Through NR.4. Notably, it is the *nurse executive* (also sometimes titled the Director of Nursing, Director of Patient Care Services, or Vice-President for Nursing) who "has the authority and responsibility for establishing standards of nursing practice." *Id.*, Standard NR.2. The "nurse executive, registered nurses, and other designated nursing staff members" may develop policies, procedures, nursing standards of patient care, and standards of nursing practice, but it is "the nurse executive or a designee(s)" who must approve them. *Id.*, Standard NR.3.

Moreover, it is hospital-generated guidelines which regulate the assignment of all nursing staff members to patient care responsibilities, tasks and functions. Thus, in planning and providing care to patients, "[e]ach provider's role and responsibility are determined by their professional skills, competence, and credentials; the care or rehabilitation being provided; hospital policies; and relevant licensure, certification, regulation, privileges, scope of practice, or job description." *Id.*, Standards on Care of Patients: Overview. It is "[t]he leaders of each department [who] make their human resources and other resource requirements known to the hospital." *Id.*, Intent of LD.2.1 Through LD.2.10. As with other nursing policies, procedures and standards, it is the hospital directors who "develop and implement policies and procedures that guide and support the provision of services" (*id.*, Standard LD.2.3); "recommend a sufficient number of qualified and competent persons to provide care" (*id.*, Standard LD.2.4); and "determine the qualifications and competence of department personnel who provide patient care services" (*id.*, Standard LD.2.5).

In sum, *all* nursing staff—registered nurses, licensed practical nurses, vocational nurses and unlicensed nursing personnel such as nursing assistants—function under written, institution-specific guidelines which are prepared by, or under the direct authority of, the nurse executive. Accordingly, the scope of any "independent judgment" exercised by one member of the nursing staff in directing the work of another is so sharply constrained by these hospital-generated guidelines, that it is "routine" within the meaning of § 2(11). *See Beverly Enters. v. NLRB*, 148 F.3d 1042, 1047 (8th Cir. 1998) ("to the extent that the nurses assign and direct, such authority does not require the use of independent judgment but is instead narrowly circumscribed by an elaborate system of procedures, policies, and protocols regarding patient care").

CONCLUSION

For the foregoing reasons, and those set forth in Petitioner's Brief, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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